LIBRARY
SUPREME COURT, U. S.

MAR 4 1968
JOHN F. DAVIS, CLERK

NO. 1198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE OSER, *Petitioner*

v.

CARL S. SMITH,
HARRIS COUNTY VOTER REGISTRAR

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 164th JUDICIAL DISTRICT

RAEBURN NORRIS
201 Scanlan Building
Houston, Texas

AL SCHULMAN
505 Scanlan Building
Houston, Texas

JAMES HIPPARD
1023 Americana Building
Houston, Texas

RONALD COHEN
505 Scanlan Building
Houston, Texas

Attorneys for Petitioner

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

INDEX

Table of Contents

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. Pertinent Pleadings and How the Federal Questions were Raised	3
B. The Facts	4
C. Why the Case is Not Moot	8
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	14

Table of Cases

	Page
Baker v. Carr, 369 U.S. 186 (1962)	9
Bartkus v. Illinois, 359 U.S. 121, 155 (1959)	13
Hague v. C.I.O., 92 U.S. 531	10
Hague v. C.I.O., 307 U.S. 496, 519 (1939)	10
Harper v. Virgina State Board of Elections, 383 U.S. 663, 670 (1966)	9
Katz v. United States, ___U.S. ___, 88 S.Ct. 507, 511 (1967)	9
Katzenbach v. Morgan, 384 U.S. 643, 647 (1966)	10
Monroe v. Pape, 365 U.S. 167 (1961)	13
Parker v. Busby, 170 S.W. 1042 (Tex. Civ. App. 1949)	11
Reynolds v. Sims, 377 U.S. 533, 554 (1964)	9, 12, 14
Snowden v. Hughes, 321 U.S. 1, 8 (1944)	13, 14
United States v. Cruikshank, 92 U.S. 543, 552, 553 (1876)	10
Walker v. Thetford, 418 S.W.2d 276, 287, 288 (June 1967), writ ref. n.r.e.	12
Wesberry v. Sanders, 376 U.S. 1, 17 (1964)	10

MISCELLANEOUS

	Page
Edmond Cahn, The Predicament of Democratic Man, 1961, Dell Pub. Co.	14
"Education and Politics in Boomtown," Moskowitz, *Saturday Review*, Feb. 17, 1968, p. 52	8

CONSTITUTION AND STATUTES

U. S. Constitution, Fourteenth Amendment	2, 3, 9, 13
U. S. Constitution, Due Process Clause	2, 9, 11
28 U.S.C., Sec. 1257(3)	2
42 U.S.C., Sec. 1983	14
Texas Revised Civil Statutes:	
Art. 5.10a	4
Art. 5.11a	6
Art. 5.12a	6, 11
Art. 5.17	4
Art. 5.17a	2, 6

INDEX TO APPENDIX IN PETITION

Appendix A:	
Instrument Cancelling Petitioner's Voter Registration for 1967, Executed by Carl Smith, Harris County Voter Registrar, November 22, 1967	1a
Judgment of the 164th Judicial District Court, January 3, 1968	3a
Appendix B:	
U. S. Constitution, Amendment XIV	6a
Texas Revised Civil Statutes	6a
Article 5.10a	6a
Article 5.11a	7a
Article 5.12a	7a
Article 5.17	8a
Article 5.17a	9a

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE OSER, *Petitioner*

v.

CARL S. SMITH,
HARRIS COUNTY VOTER REGISTRAR

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 164th JUDICIAL DISTRICT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, George Oser, prays that a writ of certiorari issue to review the judgment of the District Court of Harris County, Texas, 164th Judicial District, entered January 3, 1968 (A. 3a; Tr. 8) in Case No. 750,608, styled George Oser v. Carl S. Smith, Harris County Voter Registrar, Defendant, and George Polk and Sam Lucario, Challengers, wherein the 164th Judicial District Court of Harris County affirmed by judgment (A. 3a; Tr. 8, 9)

the Order of the Harris County Voter Registrar (A. 1a; Tr. 42) cancelling the Voter Registration of petitioner, despite petitioner's claim that such judgment constitutes an unlawful deprivation of his right to vote.

OPINION BELOW

No opinion was rendered by the court. An order stating the court's Findings of Fact and Conclusions of Law was entered December 20, 1967, and is unpublished. It appears in the official transcript filed with the papers in this Petition (Tr. 60, 61).

JURISDICTION

Judgment of the 164th District Court of Harris County, Texas was entered, nunc pro tunc, on January 3, 1968 (A. 3a; Tr. 8, 9). In petitioner's action, according to Texas Revised Civil Statutes, Art. 5.17a. (A. 9a) "the decision of the district court shall be final." Because no case has interpreted the finality of the above language, petitioner, out of an abundance of caution, has perfected an appeal in this case to the Court of Civil Appeals of Texas. However, the challenger of Petitioner's registration, by judicial admission in the Court below, took the position that no further appeal could be had from the District Court's decision. (Tr. p. 50). This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

QUESTION PRESENTED

Whether the Due Process Clause, as well as the Equal Protection Clause of the Fourteenth Amendment protects the right to vote in a state election of a citizen who has all the necessary qualifications for voting save a voter-

registration certificate, where the citizen made repeated timely applications to the voter registrar but the registrar failed and refused to issue the citizen a certificate?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States. In addition, five sections of the Texas Election Code are involved. These provisions, in pertinent part, are set forth in Appendix B to the instant Petition (A. 6a).

STATEMENT OF THE CASE

A. Pertinent Pleadings And How The Federal Question Was Raised.

Petitioner, George Oser, filed an appeal in the District Court to re-establish his right to vote, after the Harris County Voter Registrar entered an order cancelling his registration. Petitioner pled that he had made repeated timely applications for registration which were ignored by the voting officials. The registration finally issued him was held to be not timely and, therefore, cancelled at a hearing of the Registrar called to consider the status of petitioner's registration. Petitioner asserted that because of the importance of the constitutionally-protected right to vote, his continued good-faith efforts to register should be deemed to be a compliance with the state registration laws (Tr. 14-17). The court holding against petitioner, petitioner gave notice in open court before final judgment that he would press the issue of denial of due process and of equal protection of the laws (Tr. 56), and he asserted that an interpretation of the Texas voter registration law

to deny petitioner's right to vote necessarily brought such voter registration law into conflict with the requirements of due process (Tr. 56). After such notice the court concluded that the statutes were applicable to the case, found that petitioner had not been issued a timely certificate, and upheld the cancellation of the certificate (Tr. 61).

B. THE FACTS

The facts, which are not in dispute, are established by admissions in the pleadings contained in the Transcript (Tr.), by uncontroverted testimony admitted in evidence by the court and contained in the Statement of Facts (S.F.) and by Exhibits (E.).

Petitioner, George Oser, is a citizen of the United States and of Harris County, Texas. On October 15, 1966, petitioner, acting through his wife as agent, as permitted by Texas law, called the Office of the Tax Assessor, Carl S. Smith, the chief voter registrar for Harris County, and requested applications for voter registration certificates for the both of them. Petitioner's wife telephoned on the assumption that having established six-month residence in the county, they would be entitled to register during the registration period that had begun October 1, ~~(S.F. 51).~~ ~~In fact~~, Articles 5.10a and 5.17, the provisions of the election code providing for the issuance of registrations and exemption from the poll tax for new residents, ~~did~~ direct that applications for registration be issued them at the time of the call ~~(A. 6a, 8a)~~. Article 5.17, providing poll tax exemptions, was applicable until its repeal, effective February 1, 1967. The overlapping statute, Article 5.10a, which had been passed effective October 1, 1966

to establish new registration procedures in light of the demise of the poll tax, also directed that petitioner be registered at the time of their call (A. 6a). Although petitioner would not have been entitled to vote at the polls until he had been a county resident for six months and a state resident for twelve, he was entitled to register to vote under either of the two pertinent registration statutes, and because he was a citizen who met every necessary qualification in the election code, the statutes charged the tax assessor's office with the duty to accept his application. Despite this, petitioner's wife was told that they could not be registered and she was told to call back in January, 1967 (S.F. 21). Petitioner's wife, as agent, called back in January, twice. In the first of those calls, petitioner's request for a registration form was denied, and petitioner was told by the deputy registrar that petitioner and his wife would have to be residents of the state for twelve months before they could register. No law, old or new, contained a requirement such as this one. Petitioner's wife called again in January to clarify her understanding and requested she be sent application forms to register. This time the deputy to whom she was referred told her that she was "wasting her time," and no forms were sent to her (S.F. 67).

In July, 1967, following the publication of sample voter registration applications in local newspapers because of "the effect of new laws," petitioners applied for voter registration certificates, armed with the knowledge that their one year of state residence had been established. This time their applications were accepted and certificates issued them (S.F. 59-61; E. 2). Petitioner's certificate recited that he had become a resident on April 15, 1966 (*before* the beginning of the previous registration period,

October 1, 1966) and that he was entitled to vote at any election after April 15, 1967 ~~(E. 2)~~.

On or about October 26, 1967, a short while after petitioner filed as a candidate for the Houston School Board, he was contacted by the tax assessor's office and told that something was amiss with his registration ~~(S.F. 22)~~. The basis for a challenge to the certificate in his possession was Article 5.11a, which set an exclusive period for registration, and Article 5.12a, which held that new residents of the state who had established their residency *after* the beginning of the previous registration period could register for that voting year after the close of the registration period, which in petitioner's case was January 31, 1967. Article 5.12a became law on June 12, 1967, less than one month before petitioner applied for and received his registration certificate. The morning after petitioner received this message, he was contacted again by the registrar's office, who told him this time that it was a mistake on their part and that petitioner's name would not be taken off the voter rolls ~~(S.F. 64)~~.

Petitioner received over 53,000 votes in the school board election held on November 18, 1967, thereby qualifying for the run-off to be held shortly thereafter. On November 22, 1967, at a hearing called by Carl S. Smith, County Tax Assessor, petitioner's registration certificate was held to be untimely issued, and his name was ordered stricken from the voter rolls ~~(A. 1a)~~. Appeal was perfected by petitioner to the 164th Judicial District Court pursuant to Article 5.17a (A. 4a, 9a).

At the trial court petitioner asserted the liberal protections in Texas law protecting the right to vote (Tr. 14-16, 43-45). He relied largely upon an Opinion of the

State Attorney General, to be accorded the highest weight in the absence of controlling case law, which held that a person who has made timely application for a voting certificate but who has failed to obtain one because of the failure of the county authorities to provide and issue one, may not be deprived of his right to vote (Tr. 21-29). Despite this the Court upheld the action of the county voter registrar and executed an order which recited: "Plaintiff did not properly register and did not diligently comply with the means available to him to register in accordance with the law prior to the 1967 election held by the School Board of the Houston Independent School District" (Tr. 33, 34). Final judgment, nunc pro tunc, was entered on the above order on January 3, 1968 (A. 3a; Tr. 8, 9).

At the trial court the chief voting registrar testified repeatedly about mistakes in his office procedures and confusion about the election laws as the reason for the refusal of any timely applications by petitioner. His office operated under the belief, even months after Article 5.17's repeal, that petitioner could register at any time up to thirty days before an election and vote after he had completed one year of residence (S.F. 42, 43). This partly explains why petitioner was not registered when he applied during the registration period. The registrar admitted confusion regarding the changes in the election laws at the time when petitioner first applied (S.F. 48). He testified that his deputies would have been violating the procedure of their own office in not referring petitioner to someone higher in authority before making a refusal (S.F. 45). Moreover, when petitioner was finally issued a certificate in July, 1967, such issuance, according to the registrar was "for lack of being up on the law" (S.F. 42). The

registrar testified that he had issued at least forty registrations in addition to petitioner's to persons in a similar situation (S.F. 37).

It was undisputed that prior to the time of petitioner's repeated applications, the state had exercised its power to make classifications and establish requirements to qualify for the franchise, that there was no issue of bona fide residence involved or determined against petitioner, that petitioner was not contained in any category of persons disqualified to vote, and that there was no administrative benefit to the state in refusing his applications. Each time petitioner applied, there remained only for the registrar to issue an application, receive and process it.

C. Why The Case Is Not Moot

Restoring petitioner's 1967 right to vote would not be an empty gesture. The outcome of an election turned on his disputed qualifications as a voter, and decision in this case would alter the merits of an election contest filed in petitioner's behalf. After petitioner forced an encumbent member of the Houston School Board into a run-off, the County Voting Registrar cancelled petitioner's registration certificate. While petitioner was appearing before the Texas Supreme Court in an attempt to establish his qualifications as a voter by extraordinary proceeding, the School Board simply removed Oser's name from the ballot and the Court informally ruled that the question was moot because the election was already in progress. Petitioner's suit now pending calls for a new election for the four-year position.[1]

---

1. The events above were included in a longer report concerning the Houston School Board, "Education and Politics in Boomtown," Moskowitz, *Saturday Review*, February 17, 1968, p. 52.

REASONS FOR GRANTING THE WRIT

This Court has stated, "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims,* 377 U.S. 533, 554 (1964). Though the Court, in applying the Fourteenth Amendment to protect the franchise, has relied on "a searching re-examination of the Equal Protection Clause," *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 670 (1966), since the decision in *Baker v. Carr,* 369 U.S. 186 (1962), it must inescapably follow and this case is ripe for decision that State election practices also cannot conflict with the requirements of the Due Process Clause. The traditional treatment of the franchise is similar to that of a person's general right to privacy as this Court described it: "like the protection of his property and of his very life, left largely to the law of the individual States." *Katz v. United States,* ____U.S.____, 88 S.Ct. 507, 511 (1967). But despite distinction between "federal rights" and "federally-protected rights" this Court has held, "Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia State Board of Elections,* above, 383 U.S. at 665. Such continued avowals as this one by the Court compel the conclusion that a citizen may not be disenfranchised by the unlawful application of state registration laws without suffering deprivation of the fundamental fairness that our people are taught to expect automatically.

Petitioner asserts that the Due Process Clause preserves the integrity of the franchise and does so without enlarging the category of privileges and immunities of United States

citizenship that has been established previously. Having met the qualifications defined by the State, petitioner must be able to exercise his right to vote free from capricious abridgment; this is essential to "the very idea of a government, republican in form," the same way in which the Court described the right of citizens "to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552, 553 (1876). Yet as to these just-mentioned freedoms of speech and of assembly, according to Mr. Justice Stone, "it has never been held that either is a privilege or immunity peculiar to citizenship of the United States, to which alone the privileges and immunities clause refers." *Hague v. C.I.O.*, 307 U.S. 496, 519 (1939) (plurality opinion). The Due Process Clause must protect them and the clause is to be applied "whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights." *Hague v. C.I.O.*, above, 92 U.S. at 531 (by Mr. Justice Stone).

This Court has begun to surround the franchise with protections afforded only the most fundamental personal rights. The issue of personal liberty involved in protecting the franchise is expressed by the Court when it says, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Therefore, the states by law or practice "have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment or any other provision of the Constitution." *Katzenbach v. Morgan*, 384 U.S. 643, 647 (1966).

Petitioner's attempts to register were thwarted, as the record shows, because of a profusion of procedural inadequacies violative of the requirements of due process. It was only natural for a citizen inquiring on three separate occasions whether he would be permitted to register to rely on the advice of the officials to whom his inquiries were directed. The Court's Findings of Fact (Tr. 61), that petitioner "did not apply for registration as a voter during [the prescribed] period," is in glaring discrepancy with the uncontradicted testimony that petitioner not only made continued attempts to register at the times when he should have been registered, but demonstrated his persistence by applying again and being issued a registration, this time, however, after the effective date of Article 5.12a, which retrospectively closed the registrar's doors to all those who had become residents before the beginning of the previous registration period, according to the interpretation placed thereon by the District Court. Moreover, the findings in the court's opinion and judgment (A. 3a; Tr. 8, 9, 61) that petitioner did not exercise reasonable diligence or take reasonable advantage of the means available to enforce his right cannot stand before the evidence that petitioner, as a qualified voter, had done all that the law required at his own hands. The statutes which established the exclusive period for registration did not anticipate a case of an election official's refusal to act.[2] It would have been unnatural for petitioner to have pursued the matter with the election officials who told him he was "wasting his time." (S.F. 67) Legal action,

---

2. Under Texas law the failure of an election official to issue a registration blank though resulting from an innocent misapprehension of the legal requirements is tantamount to an outright refusal to issue the blank. *Parker v. Busby*, 170 S.W. 1042 (Tex. Civ. App. 1949).

by mandamus or other extraordinary remedy, would not only have been unnatural, but would have been to add onerous conditions not required by the election laws.

In addition, that one of petitioner's most fundamental rights was so casually abridged, because of the misapplication of the election laws on the part of the state voting officials specifically charged with administering them, deprived petitioner of "the opportunity for equal participation by all voters in the election of [state officials] that is required [by the Equal Protection Clause]." *Reynolds v. Sims,* above, 377 U.S. at 566.

The registrar corrected his mistake by cancelling the registration of this petitioner, alone among the forty-five registrations which had been similarly issued. The Court's affirmance of this action was, at the least, an unusual application of Texas law. A Court of Civil Appeals had recently concluded that the Texas case law unequivocably demanded an interpretation of registration laws and all other statutes regulating the right to vote which would avoid, within reasonable interpretation, depriving individuals of their franchises. The court found Texas within the general rule that "a vote is not rendered invalid by an irregularity in registration due to the act or default of registration officers." (Quoting American Jurisprudence) *Walker v. Thetford,* 418 S.W.2d 276, 287, 288 (June, 1967) (writ refused, no reversible error found by the State Supreme Court). The statement most directly in point, the Attorney General's Opinion (Tr. 21-29), held that the vote should not be deprived when attempts to register had foundered on the voting officials' ignorance of the laws. Such was the unequal treatment afforded petitioner.

In *Snowden v. Hughes*, 321 U.S. 1, 8 (1944), the Court indicated a need to allege deliberate discrimination to invoke the Equal Protection Clause, where the right to hold state office and the right to vote in state elections was held not to be a privilege of a citizen of the United States, as the Constitution defines such privileges. The Court put it as follows:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." *Snowden v. Hughes*, above, 321 U.S. at p. 8.

The reapportionment decisions of this Court dealt with dilutions of the state franchise by striking down unconstitutional statutes. To the extent therein that the Court held that the Equal Protection Clause assures an equal voice to all who hold the right to vote, the basis was laid for protecting the right from arbitrary abridgement in fact, without having to trace such abridgement to intentional discrimination. Regardless of the intent of the officials in refusing to register petitioner, when taking Mr. Justice Black's direction to examine the application of the laws "from the standpoint of the individual who is being prosecuted," *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (dissent), the franchise was withheld from petitioner when he was qualified to become a registered voter, and the disenfranchisement was not occasioned by his own fault or neglect. The decision in *Monroe v. Pape*, 365 U.S. 167 (1961), effectively overruled the provisions of *Snowden v. Hughes*, above, concerning the Equal Protection Clause

insofar as it was no longer necessary to allege specific intent in a Section 1983 action. Title 42 U.S.C. Sec. 1983. If the remaining language of *Snowden* would direct that the legal voter who has properly applied for registration in a state election, but who has been deprived of the right by the failure of the registrar to act can, by reason of such failure, also be deprived by the state of the Constitutionally-protected right to vote at the polls, then such language was overruled, *sub silentio*, by *Reynolds v. Sims*, above.

Due process of the laws requires not a search for the intention behind official conduct, but an analysis of its necessary consequence. A renowned observer of our democratic institutions has stated: "Due process is at once our acknowledgment of ignorance and our device to mitigate the damage that ignorance inflicts." Edmond Cahn, *The Predicament of Democratic Man*, 1961, Dell Publishing Co., N.Y., p. 149. The conduct of the registrar would raise the doctrine of *estoppel in pais* in common law. Due process requires that the doctrine be converted here into a barrier surrounding petitioner's Constitutionally-protected right, keeping it from capricious encroachment.

CONCLUSION

For the reasons assigned, petitioner prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the decision and judgment of the

164th Judicial District Court of Harris County, Texas, entered in Cause No. 750,608 on January 3, 1968.

Respectfully submitted,

RAEBURN NORRIS
201 Scanlan Building
Houston, Texas

AL SCHULMAN
505 Scanlan Building
Houston, Texas

JAMES HIPPARD
1023 Americana Building
Houston, Texas

RONALD COHEN
505 Scanlan Building
Houston, Texas

Attorneys for Petitioner

DATED: February 28, 1968

APPENDIX A

INSTRUMENT CANCELLING DR. GEORGE OSER'S VOTER REGISTRATION FOR 1967, EXECUTED BY CARL SMITH, HARRIS COUNTY VOTER REGISTRAR, DATED NOVEMBER 22, 1967. FILED AMONG THE PAPERS.

Since the Court of Civil Appeals has refused the writ of mandamus and apparently does not have jurisdiction;

And further since the Election Code puts the responsibility squarely upon the shoulders of the Voter Registrar to make a decision;

And since time is of the essence that I make a decision so that any or all parties to the controversy may appeal to the District Court, as provided for in Article 5.17a, Section 2, of the Election Code;

And since there is adequate relief through such an appeal, I have decided to make a determination as to the legality of the registration of Dr. George T. Oser.

After listening to all of the evidence presented by all parties concerned;

And the further fact that Dr. Oser was advised several days prior to the printing of the ballots in the first election of the fact that his voter registration was in question and would probably be challenged;

I find that I have no alternative except to rule as follows:

The registration of Dr. George T. Oser is hereby canceled.

Since Article 5.17a, Section 2, provides that either party to the controversy may appeal from my decision within 30 days, I would assume that Dr. Oser through his Attorney will do so.

Article 5.17a, Section 2, provides that the District Court is to hear any appeals from my decision. I am making my decision today in order that sufficient time will be provided the parties for an appeal prior to the printing of the ballots.

I am informed that ballots will not be printed until Monday, and I am also informed that the District Courts will be available all day Friday.

Chief Election Officer John Hill has ruled that any registrations after midnight, January 31, 1967, of persons who were residents of the State of Texas on the first day of the registration period are erroneous and that the Voter Registrar had no authority to register such persons.

Therefore Dr. George Oser's Registration for 1967 is Cancelled.

CARL S. SMITH,
Harris County Voter Registrar

November 22, 1967

JUDGMENT NUNC PRO TUNC OF THE 164th JUDICIAL DISTRICT COURT, DATED JANUARY 3, 1968. ENTERED: Volume 519, Page 553, General Minutes District & Domestic Relations Courts, in and for Harris County, Texas. ALSO NOTICE OF APPEAL GIVEN.

NO. 750,608

IN THE
DISTRICT COURT OF HARRIS COUNTY, TEXAS
164TH JUDICIAL DISTRICT

GEORGE OSER, Plaintiff

v.

CARL S. SMITH,
HARRIS COUNTY VOTER REGISTRAR, Defendant

GEORGE POLK and SAM LUCARIO, Challengers

On this the 24th day of November, 1967, came on to be heard the above entitled and numbered cause, and came Plaintiff, George Oser, in person and by his counsel of record, Raeburn Norris, Al Schulman and James L. Hippard, and announced ready with reference to plaintiff's appeal from the decision of the Harris County Voter Registrar, Carl Smith, cancelling Plaintiff's 1967 Voter Registration Certificate, the said Registrar also appearing in person and announced ready, and came said Challenger, George Polk, in person and by his counsel of record, Fred W. Moore, and stated in open court that he was not ready and that he had not had an opportunity

to prepare the pleadings he desired and asked for a continuance, whereupon the Court directed said Challenger Polk to apply to the presiding district judge, the Honorable Lewis Dickson, for such continuance which was done, but Challengers' request for continuance was denied, to which denial the Challenger excepted in open court, whereupon the Judge of this Court announced that he would proceed to trial inasmuch as an election was imminent, being called for December 5, 1967, and this Court directed all parties proceed to trial which was done and all said parties participated therein, except Sam Lucario who appeared only as a witness; and

After duly considering the pleadings, that is Plaintiff's appeal, the challenge filed by the said George Polk before the said Carl Smith, his decision and the evidence offered by all parties and the argument of counsel, this Court finds that George Oser, Plaintiff, did not properly register and did not diligently comply with the means available to him to register in accordance with the law prior to the 1967 election held by the School Board of the Houston Independent School District and that the decision of said Registrar, Carl Smith, was correct and that said appeal should be denied.

It is THEREFORE, ORDERED, ADJUDGED AND DECREED that the appeal of George Oser, Plaintiff, is hereby denied and the decision of Carl Smith, Harris County Voter Registrar, Defendant, is hereby affirmed and Plaintiff's 1967 Voter Registration Certificate is hereby cancelled to which ruling of this Court plaintiff excepted and gave notice of appeal.

Signed and entered nunc pro tunc this 3rd day of January, 1968.

JOHN R. COMPTON
Judge

APPROVED:

_____

Attorney for Challenger
George Polk

APPROVED AS TO FORM ONLY:

Raeburn Norris
Al Schulman,
James L. Hippard

By AL SCHULMAN
Attorneys for Plaintiff

APPENDIX B

U. S. Constitution, Amendment XIV, Section I:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Texas Revised Civil Statutes, art. 5.10a (effective Oct. 1, 1966)

> *Persons entitled to register*
>
> Every person who at the time of applying for registration is in other respects a qualified elector, or who will become a qualified elector within one year from the first day of March following the date of his application for registration, shall be entitled to register as a voter of the precinct in which he resides; provided, however, that no person shall be entitled to vote at any election unless he is a qualified elector on the date of the election. The registration certificate of a person who registers before he becomes a qualified elector shall have stamped or written thereon the following: "Not entitled to vote before _____" (date on which he will become a qualified elector to be inserted in the blank), and this notation shall also be placed opposite his name on the list of registered voters.

Texas Revised Civil Statutes, art. 5.11a (effective Oct. 1, 1966)

Annual registration; period for registration; period for which registration is effective

Voters shall register annually. The first period for registration under this law shall begin in each county immediately upon the effective date of this Section and shall end on the thirty-first day of January following; provided, however, that if this Section takes effect after January 1, 1967, as the result of a court decision, the registration period shall continue through the thirtieth day following the effective date. In each year thereafter, the period for registration shall be from the first day of October through the thirty-first day of January following. The first registration hereunder shall entitle the registrant, if otherwise qualified, to vote at elections held between the first day of February following the registration period and the last day of February of the following year. Each annual registration thereafter shall entitle the registrant, if otherwise qualified, to vote at elections held during the period of one year beginning on the first day of March following the registration period.

Texas Revised Civil Statutes, art. 5.12a (effective June 12, 1967)

Registration by . . . new residents

Subdivision 2. New Residents. Any person who was not a resident of the state on the first day of the regular registration period but who becomes a resident before the beginning date of a voting year may register for that voting year at any time after he becomes a resident and up to thirty days before the end of the voting year, if at the time of applying for registration he is a qualified elector or will become a qualified elector before the end of the voting year.

Texas Revised Civil Statutes, art. 5.17 (repealed effective Feb. 1, 1967)

Certificates of exemption based on nonage and nonresidence

As a condition to voting, any person who is in other respects a qualified voter and who is exempt from the payment of a poll tax by reason of the fact that he had not yet reached the age of twenty-one (21) years or was not a resident of this State on the first day of January preceding its levy, must have obtained from the tax collector of the county of his residence a certificate of exemption from the payment of a poll tax not later than thirty (30) days before any election at which he wishes to vote; provided, however, that a person who obtains an exemption certificate at any time before the first day of February for use during the ensuing voting year may vote at any election held after the beginning of the voting year if he is otherwise eligible to vote at the time of the election. No such person who has failed or refused to obtain such certificate of exemption shall be allowed to vote.

. . .

An exempt person who applies for a certificate as prescribed by this Section between the dates of October 1st and January 1st following shall be issued a certificate for use during the remainder of the current voting year (the voting year being from February 1st through January 31st) if he is then a qualified elector or will become a qualified elector before the expiration of that voting year, and shall also be issued a certificate for use during the ensuing voting year if he will be entitled to vote without payment of a poll tax during the ensuing year. On applications received between the dates of January 2nd and January 31st following, the tax collector shall issue the applicant

an exemption certificate for use during the ensuing voting year if he will be a qualified elector entitled to vote without payment of a poll tax at any time during the ensuing year. On applications received between the dates of February 1st and September 30th following, the tax collector shall issue the applicant an exemption certificate for use during the current voting year if he is then a qualified elector or will become a qualified elector before the end of that voting year.

. . .

Texas Revised Civil Statutes, art. 5.17a (effective Oct. 1, 1966)

Subdivision 2. Challenge of registered voter. Any registered voter shall have the right to challenge the registration of any other registered voter in his county by filing with the registrar of voters a sworn statement setting out the grounds for such challenge. The registrar shall give notice to the person whose registration has been challenged, and a hearing shall be held and a ruling made thereon. Either party to the controversy may appeal from the decision of the registrar to a district court of the county of registration within thirty days after the registrar's decision, and the decision of the district court shall be final. A challenged voter may continue to vote until a final decision is made canceling his registration.

BRIEF IN OPPOSI-TION TO PETITION FOR A WRIT OF CERTIORARI

LIBRARY
SUPREME COURT, U. S.

FILED
MAR 28 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1198

GEORGE OSER,
Petitioner,

vs.

CARL S. SMITH, REGISTRAR,
Respondent.

BRIEF OF CHALLENGER GEORGE POLK IN REPLY TO PETITION FOR WRIT OF CERTIORARI

FRED W. MOORE
1809 South Coast Building
Houston, Texas
Attorney for Challenger George Polk

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

SUBJECT INDEX

JURISDICTION 1

QUESTIONS PRESENTED—

Question I, Trial Court's findings amply supported by substantial evidence 3

Question II, Matters complained of by Oser are moot 4

Question III, Alleged Constitutional questions were not raised in the Trial Court until after the entry of the final judgment 4

Question IV, Oser did not exhaust his remedies in the Texas courts and has a proceeding pending now in the Texas Court of Civil Appeals concerning the subject matter of this Petition 5

ARGUMENT AND AUTHORITIES CONCERNING PROCEDURAL QUESTIONS III AND IV WHICH ALSO PERTAIN TO JURISDICTION 5

ARGUMENT AND AUTHORITIES UNDER QUESTION I 7

ARGUMENT AND AUTHORITIES UNDER QUESTION II 12

CONCLUSION 14

APPENDICES—

Appendix A A1

Appendix B A3

Index of Authorities

CASES

Cedillo v. *Standard Oil Co. of Texas*, (1961) 291 F.2d 246, cert. den. 368 U.S. 955 12

Cox v. *State of Texas*, 26 S.Ct. 671, 202 U.S. 446, 50 L. Ed. 109 6

Fleming v. *Palmer*, 123 F.2d 749 (1941), cert. den. 316 U.S. 662 11

In re Lamkin, 78 S. Ct. 137, 355 U.S. 59, reh. den. 355 U.S. 908 (1957) 6

Jackson v. *State*, 280 S.W. 202 (Tex.Cr.A. 1925) cert. den. 46 S. Ct. 474 5

Koy v. *Schneider*, 225 S.W. 188 (nwh, 1920) 12

Polk v. *Davidson*, 196 S.W.2d 632 (Tex.) 13

State v. *Humble Oil & Refining Co.*, 194 S.W.2d 811 (1946 nwh) 6

U. S. v. *E. I. Du Pont De Nemours & Co.*, (1956) 76 S. Ct. 994, 351 U.S. 377 11-12

U. S. v. *National Association of Real Estate Boards*, (1950) 70 S. Ct. 711, 339 U.S. 485 12

U. S. v. *Still*, (1941) 120 F.2d 876, cert. den. 314 U.S. 671 11

Waters-Pierce Oil Co. v. *State of Texas*, 29 S. Ct. 227, 212 U.S. 112 6

TEXTS AND STATUTES

Barron and Holtzoff, Federal Practice and Procedure, Vol. 2B, p. 525 11

Rule 52a FRCP 11

3 Tex. Jur. 2d 313 14

57 Tex. Jur. 2d 354 12

28 USCA §1257(3) 2

VACS, Art. 5.17a 6

VACS, Art. 5.178(2) 2

VACS, Art. 2776a 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1198

GEORGE OSER,
Petitioner,

vs.

CARL S. SMITH, REGISTRAR,
Respondent.

BRIEF OF CHALLENGER GEORGE POLK IN REPLY TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

NOW COMES Challenger, George Polk, and respectfully files this his brief in reply to the petition for writ of certiorari of George Oser.

JURISDICTION

There is no sufficient allegation of jurisdiction in the petition. This controversy has dwindled to a mere mental exercise involving the abstract question as to whether or not George Oser was properly registered in 1967 when he attempted to run for a position on the School Board for the

Houston Independent School District. Petitioner claims that this Court has jurisdiction under 28 USCA §1257(3) but the alleged existence of a Federal question was not raised until after the entry of the final judgment in this cause by the District Court of Harris County, Texas. Petitioner's appeal is pending in the Court of Civil Appeals for the First Supreme Judicial District of Texas in Houston. No Texas appellate court has considered this question, although Petitioner has his appeal filed in the Texas appellate court indicated.

The first pleading filed in the District Court of Harris County, Texas, raising any Federal question was Petitioner George Oser's reply to Challenger George Polk's motion to strike Oser's request for findings of fact and conclusions of law which obviously were requested after the entry of the final judgment, which was signed and originally entered December 4, 1967. Thereafter Petitioner's counsel filed a motion for nunc pro tunc entry of a judgment because the original decree entered failed to contain a notice of appeal. Judge Compton, acting for Judge Cunningham, on January 3, 1968, entered a nunc pro tunc judgment January 3, 1968. No alleged invalidity of a treaty or statute of the United States is involved, nor is the validity of any state statute drawn in question as required by §1257, 28 USCA, Subdivision (3).

In said reply of Petitioner George Oser filed after judgment in the trial court, he stated that an appeal is permitted, directly to the Supreme Court of the United States, because Art. 5.178(2) VACS infringes Federally protected rights. If Petitioner has that right of appeal, he has not exercised same, but on the contrary has filed a petition for writ of certiorari.

Oser is not a Negro and the record does not disclose any violation of his civil rights. If the Texas Voter Registration Law is in conflict with the Fifth and Fourteenth Amendments of the Constitution, there is no allegation in Oser's pleadings filed in the trial court as to how the conflict arises, or what are the provisions of the State statutes and said amendments that conflict or how they conflict. We submit the alleged jurisdiction of this Court does not exist with reference to this case.

QUESTIONS PRESENTED

There are two questions presented by Oser with reference to the merits and likewise two questions concerning procedure as follows:

I.

At the request of Petitioner, Judge Warren P. Cunningham of the trial court filed findings of fact and conclusions of law. He did not accept the drafts of either Petitioner or this Challenger, but wrote such findings himself. A copy is attached hereto marked Appendix A. If the Judge's findings of fact to the effect that George Oser did not make a reasonable effort or use reasonable diligence to register as a voter during the period between October 1, 1966 and January 31, 1967, and that he did not apply for registration as a voter during such period, is supported by any evidence, then there is no merit to Petitioner's contentions unless the state statutes complained of are unconstitutional as a matter of law. The trial court recognized said statutes and found that he had jurisdiction of the parties and subject matter and set forth his conclusions of law in addition to his findings of fact. No sufficient basis has been pled for holding such statutes invalid on their face as a matter of law. Under the facts as found by the trial

judge which are amply supported by the evidence, Oser's petition should be dismissed

II.

The matters complained of by Oser are moot. The registration certificate which he held was for the year 1967. That year has passed. The election has been held. The School Board is functioning. Oser did not attempt to take advantage of any remedies available to him, such as injunction. He did not sue for damages. He simply asks this Court to decide the abstract question as to whether his registration in 1967 was valid or invalid. Under the authorities, this Court should not consider such abstract question at this time.

III.

The first procedural question involved is whether or not Oser has the right to a writ of certiorari concerning the constitutional questions alleged by him when he did not raise such constitutional questions until after the trial court had decided the controversy and rendered the judgment. The only pleading filed by Oser referring to the constitutional questions now asserted by him is George Oser's reply to Challenger George Polk's motion to strike Oser's request for findings of fact and conclusions of law. Such proceedings occurred after the entry of final judgment. Oser should not be allowed at this time to present to this Court a claim asserted for the first time after the entry of final judgment. Oser chose to apply to this Court for writ of certiorari. Under the Texas decisions, the raising of these questions for the first time in connection with this petition for certiorari is too late. This question also involves jurisdiction. He should have raised those questions in the trial court and although he has an appeal pending in the

Court of Civil Appeals, such questions have never been passed upon by any Texas appellate court. His petition for writ of certiorari should therefore be denied.

IV.

The second procedural question is whether Oser has exhausted his remedies in the Texas courts. We do contend that he has no right of appeal under the Texas statutes. He has chosen, however, to ignore that provision of the Texas statutes and has perfected an appeal. Until a Texas appellate court of final jurisdiction has ruled on his appeal, we contend he has no standing in this Court with reference to the matters asserted in his petition for certiorari. If our contentions as to this question are correct, then this Court has no jurisdiction of this suit.

ARGUMENT AND AUTHORITIES CONCERNING PROCEDURAL QUESTIONS III AND IV WHICH ALSO PERTAIN TO JURISDICTION

In *Jackson* v. *State*, 280 S.W. 202 (Tex.Cr.A. 1925) cert. den. 46 S. Ct. 474, the Court of Criminal Appeals of Texas, which is the highest court of this State with reference to criminal matters, held:

> "A necessary predicate to invoke federal review is that the state court has been first given opportunity to pass on the question as to whether there was involved in the particular matter any federal question. Coffee v. Groover, 123 U.S. 1, 8 S. Ct. 1, 31 L. Ed. 51; Illinois Cent. R. v. Mulberry Coal Co., 238 U.S. 275, 35 S. Ct. 760, 59 L. Ed. 1306; Cincinnati, etc., Ry. Co. v. Slade, 216 U.S. 78, 30 S. Ct. 230, 54 L. Ed. 390; Winona, etc., Land Co. v. Minnesota, 159 U.S. 540, 16 S. Ct. 88, 40 L. Ed. 252; Bolln v. Nebraska, 176 U.S. 83, 20 S. Ct. 287, 44 L. Ed. 382; Erie Ry. Co. v. Purdy, 185 U.S. 148, 22 S. Ct. 605, 46 L. Ed. 847. This is always true when

required under the practice of the particular state. Miller v. Texas, 153 U.S. 535, 14 S. Ct. 874, 38 L. Ed. 812." (p. 208)

The decision styled *In re Lamkin,* 78 S. Ct. 137, 355 U.S. 59, reh. den. 355 U.S. 908 (1957), decided by this Court, denied a petition for writ of certiorari because the decision of the state courts was found to rest on adequate state ground, the petitioner having failed to comply with applicable state procedures.

In *State* v. *Humble Oil & Refining Co.,* 194 S.W.2d 811 (1946 nwh), the court held that the Federal question was raised for the first time in the motion for rehearing in the Supreme Court of Texas, which the court held was too late and therefore was waived by the applicants. The court said in that opinion:

> "After this case left the District Court, a Federal question was raised for the first time, and that was in their motion for rehearing in the Supreme Court of this state, after that court had refused their application for writ of error for want of merit.
>
> "And I certify that under the Texas Practice, any Federal question that might have been in the case was not raised in time to be considered, and therefore was waived by the applicants." (p. 812)

In *Cox* v. *State of Texas,* 26 S. Ct. 671, 202 U.S. 446, 50 L. Ed. 109, it was held that a Federal question although referred to in the assignments of error in the state appellate court and in the Supreme Court of the United States, cannot be considered by the latter court on writ of error to the state court where it does not appear the state court dealt with the question. See also *Waters-Pierce Oil Co.* v. *State of Texas,* 29 S. Ct. 227, 212 U.S. 112.

One of the statutes in question, Subdivision 2 of Article 5.17a Texas Election Code VACS (Petitioner's Appen-

dix B, p. 9a), provides that an appeal may be had from the decision of the Registrar, with reference to a challenge of any registration, to the District Court within thirty days after the Registrar's decision and that the decision of the District Court shall be final.

No state appellate court, however, has passed on the question of the finality of the District Court's decision and there is no necessity to pass on it here because the constitutional questions which are now raised with reference to said statute were not raised in the trial court. Furthermore, Petitioner has chosen to ignore the provision (no appeal from District Court) just mentioned and has perfected an appeal involving the subject matter of this case to the Court of Civil Appeals for the First Supreme Judicial District of Texas at Houston and said appeal is now pending there. It is our view that the Texas appellate court mentioned will dismiss the appeal because the matter is moot under the great weight of authority as we shall hereinafter point out but no ruling has been made. No appeal has been denied because of said provision of the Texas Election Code by any court within our knowledge.

If it were denied, we believe it would be a valid denial but that question is not before this Court.

ARGUMENT AND AUTHORITIES UNDER QUESTION I ABOVE

On December 18, 1967, the trial court held a hearing concerning findings of fact and conclusions of law which ended by the Court preparing his own findings of fact and conclusions of law and signing same December 20, 1967. The court had previously entered his judgment signing same December 4, 1967. A copy is attached hereto marked Appendix B; it contained no notice of appeal. Conse-

quently, after a hearing held January 3, 1968, Judge Compton in lieu of Judge Cunningham, entered a nunc pro tunc judgment containing said notice of appeal; otherwise the judgments are the same. Subsequent to the decree as stated, that is December 20, 1967, Judge Cunningham stated in his findings of fact that the plaintiff George Oser did not make a reasonable effort or use reasonable diligence to register as a voter during the period of October 1, 1966 through January 31, 1967 and that he did not apply for registration as a voter during such period. The evidence supporting this finding is substantial. There is no evidence against it.

Both Dr. Oser and his wife testified. Part of Dr. Oser's previous verified testimony before Mr. Smith was likewise introduced without objection.

Oser testified that his wife did not apply to register for him but on the contrary she called the office of the registrar for information for him (SF 17)* and stated she asked if they could come down and register. She further testified that she did not appear before Mr. Smith or anyone in his office and asked for permission to register and that she did not attempt to register for herself, but on the contrary called to see if they both could come down to register (SF 17).

She stated her first inquiry was made in October of 1966 and that in January, 1967, she testified that she made another telephone inquiry following the same procedure (SF 18). He received his certificate of registration in July, 1967.

He paid no poll tax of any kind during this period (SF 19) and he personally did not talk to anyone about register-

*The abbreviation "SF" as used in this brief means Statement of Facts included as a part of the record filed herein.

ing during the period running from October 1, 1966 through January 31, 1967 (SF 20).

In response to inquiry made to Mr. Smith, the Registrar, Dr. Oser testified that he was not told that he could not register but on the contrary his wife was told to call back in January (SF 21).

About October 26, 1967, Mr. Oser was advised by an employee of the Registrar, Mr. Grigsby, that Oser's registration was not proper (SF 22). Challenges by Polk and Lucario were filed.

Mr. Smith did not immediately find that Mr. Oser was improperly registered but on the contrary he called a discussion or hearing with reference to the matter on November 16, 1967 (SF 31). He made no ruling at that time but set another hearing for November 22, 1967.

Mr. Smith wrote the Secretary of State, John Hill at Austin, asking his opinion with reference to Oser's registration (see Exhibit C-3). The Secretary of State replied that if the new residents came to Texas before October 1, 1966 and applied for registration after January 31, 1967, they were registered erroneously. Mr. Hill, in his letter to Mr. Smith of November 13, 1967 (Exhibit C-4) quoted Article 5.10a of the Texas Election Code.

Mr. Smith, the Registrar, did not concede that the Osers were erroneously turned down (SF 37). He said it was possible and there were forty some odd persons similarly situated (SF 37). At one time he said about forty-five (SF 42). He also testified, however, that his office registered several thousand new residents during the proper time, that is between October 1, 1966 and January 31, 1967 (SF 39). Smith testified that his office registered 3,803 such new residents during said period from October

1, 1966 to January 31, 1967 (SF 47, 81). Smith further testified that he never refused to register Dr. Oser (SF 44) and that no one in his office ever reported any such telephone conversation testified to by Mrs. Oser (SF 45).

This Court should not take jurisdiction of a claim of this kind when the Petitioner made no personal request but on the contrary produced his wife who testified she made some telephoned inquiries.

Oser was fully aware before the election that his registration was being questioned (SF 46). He did participate in the initial election but he did not participate in the runoff.

Petitioner attached to his petition filed in the District Court a copy of an opinion from the State Attorney General rendered July 22, 1952 (Exhibit C). That opinion has no relevance here. It pertains to an ancient and outmoded set of election laws. Oser was not barred from registering because of the failure of the county authorities to provide and issue him a certificate but on the contrary because he did not qualify for registration and made no attempt to do so. Smith testified that his office received several thousand telephone calls every day (SF 47) and that during the period in question, that is certainly during the last month, January, 1967, there was an active campaign on the part of many agencies to bring about a high registration of voters and that application blanks were published daily in the Houston newspapers during all of January, 1967 and that he, Smith, estimated that such publication of blank applications amounted to several million (SF 78).

After Mr. Smith testified about the million or more said application blanks printed in the various newspapers in Houston which could be cut out, filled in, signed and

mailed in, Mrs. Oser took the witness stand and testified she had not seen any voter registration application forms in any newspaper but that after learning about the applications, she attempted to find them. When she was unable to find one in the newspaper that she had in her house, she called down to the tax office to see if she could get one (SF 86). She did not testify as to the result of that inquiry (SF 86, 87).

Mr. Smith testified that the Houston Post, the Houston Chronicle and other newspapers published these applications during the month of January, 1967; that his office maintained employees to man telephones to take all applications and mail applications to people that asked for them (SF 81). He also testified that his computer found that they had registered 3,803 new registrations during the proper period but he had not determined how many of them came through newspapers (SF 81, 82).

Barron and Holtzoff, Federal Practice and Procedure, Vol. 2B, p. 525, sets out the rule that findings of fact may not be set aside unless clearly erroneous as follows:

> "Findings of fact are not 'clearly erroneous' unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. The appellate court does not consider and weigh the evidence de novo." (pp. 525, 526)

Numerous Federal decisions are cited in said text in support of the above quotation. Rule 52a FRCP is to the same effect. See *Fleming* v. *Palmer,* 123 F.2d 749 (1941), cert. den. 316 U.S. 662; *U. S.* v. *Still,* (1941) 120 F.2d 876, cert. den. 314 U.S. 671; *U. S.* v. *E. I. Du Pont De Nemours*

& Co., (1956) 76 S. Ct. 994, 351 U.S. 377; *U. S.* v. *National Association of Real Estate Boards*, (1950) 70 S. Ct. 711, 339 U.S. 485; *Cedillo* v. *Standard Oil Co. of Texas*, (1961) 291 F.2d 246, cert. den. 368 U.S. 955.

The Texas rule is even stronger in support of findings of fact by the trial court. The Texas rule is that fact findings may embody inferences deducible from the evidence, and a finding will be sustained if it is based on any substantial competent evidence, 57 Tex. Jur. 2d 354. Numerous decisions are cited in support of this statement.

Article 2776a VACS pled by Polk in his challenge provides that:

> *"No person shall be elected as a trustee of a school district in this State unless he is a qualified voter."*

We submit that the conclusion of the trial court that Oser was not a qualified voter is amply supported by substantial and credible evidence as is the court's finding of fact that Oser did not make a reasonable effort or use reasonable diligence to register as a voter during the period between October 1, 1966 to January 31, 1967 and that he did not apply for registration as a voter during such period as required by the law.

ARGUMENT AND AUTHORITIES UNDER QUESTION II

The decision of *Koy* v. *Schneider*, 225 S.W. 188 (nwh, 1920), considered a controversy similar to this case. Appellant in that case brought a suit in the district court for mandamus against appellee as tax collector to compel him to receive from appellant the sum of $1.75 in payment for a poll tax and to require him to issue her a receipt therefor so she would be qualified to participate and vote in a Democratic Primary election. Appellee answered by gen-

eral pleas and also alleged the unconstitutionality of the act under which appellant claimed. The court held that the time in which the payment of the poll tax entitling plaintiff to vote expired, that all such elections involved had long since been held and it would be an idle and vain thing for the court to render a judgment compelling the tax collector to issue such a receipt. The court further held that the only judgment that could be entered would be to dismiss the appeal because the subject matter of the suit had ceased to exist, which was done.

This ruling is in line with the great weight of authority in Texas. For instance, in *Polk* v. *Davidson*, 196 S.W.2d 632 (Tex.), the Supreme Court of that state held that an election contest involving the Sheriff's office in Harris County had become moot and should be dismissed. A writ of mandamus was issued in that case directing that Davidson cease his contest. The judgment became effective immediately and the opinion stated that the court would not entertain any motion for rehearing. In that decision, the court said:

> "A case becomes moot 'when any right which might be determined by the judicial tribunal could not be effectuated in the manner provided by law.' Sterling v. Ferguson et al., 122 Tex. 122, 142, 53 S.W.2d 753, 761. As regards party primary nominations, the authorities recognize that one holding a certificate that he is the nominee is endowed with a valuable right which he may enforce, that is, the right to have his name printed on the official election ballot as such nominee until the certificate is set aside in a proper proceeding, such as an election contest; that voters as well as nominees holding certificates have a valuable right under the statutes of this state to have absentee ballots printed and available to them at the prescribed time; that, therefore, when the time comes that the

> issues cannot be heard and a final judgment entered adjudging the validity or invalidity of the nominee's certificate so that absentee ballots can be printed and available to voters as and when required by statute, the contest is moot and must be dismissed." (p. 634)

As is apparent from Smith's testimony hereinbefore mentioned, Oser was aware that his certificate was erroneous before the printing of the ballots for the run-off election. He took no action at that time to protect his alleged rights. The rule mentioned has long been recognized in Texas as is evident from the following quotation from 3 Tex. Jur. 2d 313:

> "Appellate courts will not decide moot or abstract propositions. In other words, the existence of an actual controversy is essential to an exercise of appellate jurisdiction. A case, issue, or proposition is, or becomes, moot or abstract when it does not, or ceases to, rest on any existing fact or right."

Numerous cases are cited in said text supporting the above quotation.

CONCLUSION

The fact situations considered in the cases cited by Petitioner as reasons for granting the writ do not exist here. Oser never did personally request the issuance of a registration certificate. He has not been unlawfully denied his right to vote. His wife, according to her testimony, made three inquiries about registering by telephone during the period extending from October 1, 1966 through January 31, 1967. Any married man can certify to the uncertainty of such conversations. As far as we have been able to ascertain, that is the first time any request for the issuance of a writ of certiorari has been presented to the Supreme Court of the United States based upon a wife's

telephoned inquiries. The findings of fact by the trial judge are amply supported by the evidence. The conclusions of law pronounced by him are in conformance with the great weight of authority. We request that the petition for writ of certiorari be denied.

Respectfully submitted,

FRED W. MOORE
1809 South Coast Building
Houston, Texas
Attorney for Challenger
George Polk

Copies of the above and foregoing reply brief were mailed by Certified Mail to Raeburn Norris, 201 Scanlan Building, Houston, Texas, today, March ....., 1968, and also by regular mail, properly addressed, to Al Schulman, 505 Scanlan Building, Houston, Texas, James J. Hippard, 1023 Americana Building, Houston, Texas, and Ronald Cohen, 505 Scanlan Building, Houston, Texas, attorneys of record for Petitioner, on said date.

.....

Attorney for Challenger
George Polk

APPENDIX A

No. 750,608

GEORGE OSER,
Plaintiff
vs.
CARL S. SMITH, HARRIS COUNTY VOTER REGISTRAR,
Defendant
GEORGE POLK and SAM LUCARIO,
Challengers

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
164TH JUDICIAL DISTRICT

Order Concerning Findings of Fact and Conclusions of Law Requested by Plaintiff and Denying in Part Challenger George Polk's Motions Concerning Same

On this the 18th day of December, 1967 came on to be heard Plaintiff's request for findings of fact and conclusions of law and Challenger George Polk's motion to strike and deny Plaintiff's request and came attorneys for Plaintiff and said Challenger and announced ready with reference to said request and said motion and after duly considering pleadings filed herein, this Court's decree, said request and said motion, this Court concludes that Challenger Polk's motion to strike and deny Plaintiff's request for findings of fact and conclusions of law prepared and submitted by Plaintiff are not proper and involve numerous evidentiary matters and not ultimate issues;

It is therefore ORDERED that Challenger Polk's motion to strike and deny Plaintiff's request for findings of fact and conclusions of law be and the same is hereby overruled and denied, to which action of the Court Challenger Polk, then and there, in open court excepted.

It is also ORDERED that the findings of fact and conclusions of law as prepared and submitted by Plaintiff are not sufficient and they are hereby denied, to which action

of the Court the Plaintiff, then and there, in open court excepted, but in response to the request of the Plaintiff I hereby make and file the following, as my findings of fact and conclusions of law herein:

FINDINGS OF FACT

I find that the Plaintiff, George Oser, did not make a reasonable effort or use reasonable diligence to register as a voter during the period October 1, 1966, through January 31, 1967, and that he did not apply for registration as a voter during such period.

CONCLUSIONS OF LAW

(1) This Court has jurisdiction of the parties and of the subject matter of this cause by virtue of Article 5.17a(2) of the Texas Election Code (Article 5.17a(2) Vernon's Annotated Texas Civil Statutes).

(2) Under the provisions of Article 5.11a subdivision (2) of the Texas Election Code (Article 5.11a Vernon's Annotated Civil Statutes of Texas) all persons, otherwise qualified, are required to register each year during the period from the first day of October through the thirty-first day of January following.

(3) The Plaintiff, George Oser, not having registered as a voter during the period provided by law and not having made a reasonable effort to register during such period, is not entitled to register to vote during the voting year from February 1, 1967, through January 31, 1968, at a date later than January 31, 1967, and the registration certificate issued to him by the Registrar was improperly issued and should be cancelled.

SIGNED this 20th day of December, 1967.

/s/ Warren P. Cunningham
Judge

APPENDIX B

No. 750,608

GEORGE OSER, Plaintiff vs. CARL S. SMITH, HARRIS COUNTY VOTER REGISTRAR, Defendant GEORGE POLK and SAM LUCARIO, Challengers	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 164TH JUDICIAL DISTRICT

On this the 24th day of November, 1967, came on to be heard the above entitled and numbered cause, and came Plaintiff, George Oser, in person and by his counsel of record, Raeburn Norris, Al Schulman and James L. Hippard, and announced ready with reference to plaintiff's appeal from the decision of the Harris County Voter Registrar, Carl Smith, cancelling Plaintiff's 1967 Voter Registration Certificate, the said Registrar also appearing in person and announced ready, and came said Challenger, George Polk, in person and by his counsel of record, Fred W. Moore, and stated in open court that he was not ready and that he had not had an opportunity to prepare the pleadings he desired and asked for a continuance, whereupon the Court directed said Challenger Polk to apply to the presiding district judge, the Honorable Lewis Dickson, for such continuance which was done, but Challengers' request for continuance was denied, to which denial the Challenger excepted in open court, whereupon the Judge of this Court announced that he would proceed to trial inasmuch as an election was imminent, being called for December 5, 1967 and this court directed all parties to proceed to trial which was done and all said parties participated therein, except Sam Lucario who appeared only as a witness; and

After duly considering the pleadings, that is Plaintiff's appeal, the challenge filed by the said George Polk before the said Carl Smith, his decision and the evidence offered by all parties and the argument of counsel, this Court finds that George Oser, Plaintiff, did not properly register and did not diligently comply with the means available to him to register in accordance with the law prior to the 1967 election held by the School Board of the Houston Independent School District and that the decision of said Registrar, Carl Smith, was correct and that said appeal should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the appeal of George Oser, Plaintiff, is hereby denied and the decision of Carl Smith, Harris County Voter Registrar, Defendant, is hereby affirmed and Plaintiff's 1967 Voter Registration Certificate is hereby cancelled to which ruling of this Court Plaintiff excepted.

Signed and entered this 4th day of December, 1967.

/s/ W. P. Cunningham
Judge

APPROVED:
/s/ F. W. Moore
Attorney for Challenger
George Polk

APPROVED AS TO FORM ONLY:
Raeburn Norris
Al Schulman
James L. Hippard

by .....
Attorneys for Plaintiff

LIBRARY
SUPREME COURT, U. S.

FILED
APR 18 1968
JOHN F. DAVIS, CLERK

NO. 1198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE OSER, *Petitioner*

v.

CARL S. SMITH, *Harris County Voter Registrar*

SUPPLEMENTAL BRIEF OF PETITIONER, GEORGE OSER, SUBMITTED IN RESPONSE TO REPLY BRIEF OF CHALLENGER, GEORGE POLK

AL SCHULMAN
1401 South Coast Building
Houston, Texas

RAEBURN NORRIS
201 Scanlan Building
Houston, Texas

JAMES HIPPARD
1023 Americana Building
Houston, Texas

RONALD COHEN
505 Scanlan Building
Houston, Texas

Attorneys for Petitioner

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

INDEX

	Page
Proposition I	2
The order of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas dismissing Petitioner's appeal in the instant cause on April 11, 1968, leaves the judgment of the 164th District Court of Harris County, Texas, final under state law and permits jurisdiction in this Honorable Court under 28 U.S.C. 1257(3).	
Proposition II	3
The Federal questions asserted herein were raised in the trial Court in time for the Court to pass upon them.	
Proposition III	5
Reversal by this Court on the constitutional issue of the right to vote would virtually compel a decision in the election contest now pending that Petitioner was illegally removed from the School Board's run-off ballot.	
Conclusion	6
Appendix	7

LIST OF AUTHORITIES

CASES	Page
Grovey v. Townsend, 295 U.S. 45, 47 (1935)	3
UNITED STATES STATUTES	
28 U.S.C. 1257(3)	2
TEXAS REVISED CIVIL STATUTES	
Article 5.172	2
TEXAS RULES OF CIVIL PROCEDURE	
Rule 306b	4, 5

NO. 1198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE OSER, *Petitioner*

v.

CARL S. SMITH, *Harris County Voter Registrar*

SUPPLEMENTAL BRIEF OF PETITIONER, GEORGE OSER, SUBMITTED IN RESPONSE TO REPLY BRIEF OF CHALLENGER, GEORGE POLK

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, George Oser, submits this, his Supplemental Brief in support of his Petition for Writ of Certiorari styled George Oser, Petitioner, v. Carl S. Smith, Harris County Voter Registrar, No. 1198, in the October, 1967 term of this Court. Petitioner respectfully submits the following propositions to be true in this case:

I.

The order of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas dismissing Petitioner's appeal in the instant cause on April 11, 1968, leaves the judgment of the 164th District Court of Harris County, Texas, final under state law and permits jurisdiction in this Honorable Court under 28 U.S.C. 1257(3).

II.

The Federal questions asserted herein were raised in the trial Court in time for the Court to pass upon them.

III.

Reversal by this Court on the constitutional issue of the right to vote would virtually compel a decision in the election contest now pending that Petitioner was illegally removed from the School Board's run-off ballot.

ARGUMENT AND AUTHORITIES UNDER PROPOSITION I

The order of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas dismissing Petitioner's appeal in the instant cause on April 11, 1968, leaves the judgment of the 164th District Court of Harris County, Texas, final under state law and permits jurisdiction in this Honorable Court under 28 U.S.C. 1257(3).

In the statement of Jurisdiction (Pet. Cert. 2), Petitioner set forth Article 5.17a of the Texas Revised Civil Statutes (A. 9a), stating that in Petitioner's cause "the

decision of the district court shall be final." The Respondent herein, George Polk, by judicial admission in the court below, took the position that no further appeal could be had from the District Court's decision (Tr. 50). Respondent maintained this position in his Reply Brief herein by saying, "We do contend that he has no right of appeal under the Texas statutes." (Reply, 5). Not knowing what Respondent would contend and out of extraordinary caution, Petitioner perfected appeal in the State courts. In the face of Article 5.17a and of the foregoing, Petitioner filed a Motion to Dismiss for Want of Jurisdiction in the Court of Civil Appeals. Petitioner's Motion to Dismiss for Want of Jurisdiction was granted on April 11, 1968, and the Order of Dismissal, as duly certified, is reprinted herein (A. p. 7).

This Court held in a previous petition by a Texas voter that judgment has been rendered "by the highest court of a State in which decision could be had," where the trial court's judgment is final under state law. *Grovey v. Townsend,* 295 U.S. 45, 47 (1935). The Writ sought herein is directed to the decision of the District Court, the court specified in the statute.

ARGUMENT AND AUTHORITIES UNDER PROPOSITION II

The Federal questions asserted herein were raised in the trial Court in time for the Court to pass upon them.

As indicated in the Petition, the ruling of the Registrar cancelling Petitioner's Voting Certificate took place on November 22, 1967 (Pet. 1a, 2a). The following day being Thanksgiving, Petitioner appealed to the District Court and had a hearing on the facts on November 24,

1967 (Pet. 3a). Thereafter, after brief oral argument, the court entered a judgment, without signature of approval as to form or content by Petitioner, on December 4, 1967. Such a "judgment" in Texas law is not final nor appealable until thirty (30) days after the court enters it, according to Texas Rules of Civil Procedure, Rule 329b, which says in pertinent part:

> "5. Judgments shall become final after the expiration of thirty (30) days after the date of rendition of judgment or order overruling an original or amended motion for new trial."

On December 18, 1967, fourteen days after the rendition of judgment and within the time in which the court could substitute a new and different judgment, the court held a hearing in which Petitioner argued that an adverse decision would deny him due process and equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution and that a ruling denying Petitioner the right to vote would necessarily bring the Texas voter registration law into conflict with the requirements of due process. A record of the issue raised is included in a motion filed by Petitioner and is a part of the record (Tr. 56).

Thereafter, on January 3, 1968, the court entered judgment in the cause, nunc pro tunc, which is the judgment sought to be appealed here. The judgment, nunc pro tunc, is substituted for any other order and is the final appealable judgment in any civil cause in Texas. Rule 306b, Texas Rules of Civil Procedure, sets forth as follows:

> "When a judgment or order is entered nunc pro tunc, the right of appeal shall date from the date

of rendition of the nunc pro tunc judgment or order, which shall be deemed to be the date upon which the trial judge signed the nunc pro tunc judgment or order if the date is shown therein; and the periods within which the various steps in such an appeal are to be taken shall be computed from that date."

ARGUMENT AND AUTHORITIES UNDER PROPOSITION III

Reversal by this Court on the constitutional issue of the right to vote would virtually compel a decision in the election contest now pending that Petitioner was illegally removed from the School Board's run-off ballot.

Respondent's Reply Brief points out the reason that decision by this Court is not moot:

> "Article 2776a VACS pled by Polk in his challenge provides that:
>
> > 'No person shall be elected as a trustee of a school district in this State unless he is a qualified voter.'" (Reply 12)

Petitioner's qualification as a voter is both the subject of the Petition herein and the justification given for Defendant's fait accompli in Petitioner's election contest now pending in the State district court.

Respondent points out that Petitioner is not a Negro citizen and says, therefore, that there is no "violation of his civil rights." (Reply, 3) Petitioner appealed not in his racial capacity, but as a citizen who was in all ways qualified to be a voter, but whose franchise was withheld by the arbitrary conduct of state voting officials.

It is a sad commentary on the state of the law if under the facts here presented a Negro citizen would be protected and others would not. All United States citizens, whatever their color, have the same Constitutional protections pertaining to their right to vote.

CONCLUSION

For the reasons assigned herein and in the Petition for Writ of Certiorari, No. 1198, Petitioner prays that his Petition be granted and that the writ issue to review the decision and judgment of the 164th Judicial District Court of Harris County, Texas, entered in Cause No. 750,608 on January 3, 1968.

Respectfully submitted,

AL SCHULMAN
1401 South Coast Building
Houston, Texas

RAEBURN NORRIS
201 Scanlan Building
Houston, Texas

JAMES HIPPARD
1023 Americana Building
Houston, Texas

RONALD COHEN
505 Scanlan Building
Houston, Texas
Attorneys for Petitioner

APPENDIX

No. 15320

IN

Court of Civil Appeals

HOUSTON

GEORGE OSER, Appellant,

vs.

CARL S. SMITH ET AL, Appellees.

CERTIFIED COPY OF COURT'S JUDGMENT

ROLA HAMM, Clerk

From Clerk's Office, Court of Civil Appeals, Houston, Texas.

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1967, present SPURGEON E. BELL, Chief Justice, and Associate Justices TOM F. COLEMAN and PHIL PEDEN.

In the cause, GEORGE OSER, Appellant, No. 15320

vs.

From District Court of Harris County
Tr Ct #750,608
Opinion by —

CARL S. SMITH ET AL, Appellees, the following judgment was rendered on April 11, 1968:

"On this day came on to be considered appellant's motion to dismiss his appeal herein, together with the letter-reply of the contestant Polk, said motion reciting, 'Appellant states to the Court that he does not wish to further prosecute his appeal and moves that said appeal be dismissed. * * *,' and the same having been duly considered and found meritorious, it is therefore considered, adjudged and ordered that appellant's motion to dismiss his appeal herein be and the same hereby is granted; that the appellant, George Oser, and his surety, Lawyers Surety Corporation, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

I, ROLA HAMM, Clerk of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of the judgment rendered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 15, Page 69.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 15th day of April, A. D. 1968.

(SEAL)

ROLA HAMM, Clerk

By ..... Deputy